IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

SUMAMRY SUIT NO. 1858 OF 2004

FORBES GOKAK LTD ...Plaintiffs.
vs.
ORIENTAL BANK OF COMMERCE ...Defendants.

Mr. A.Y. Bookwalla, Sr. advocate with C. D'souza i/by. Prem Ranga
for the plaintiffs.
S.H. Doctor, Sr. Advocate with Ms. Neeta Rajdan
i/by DSR Associates
for the applicants.
None for the defendants.

CORAM: S.U. KAMDAR, J.

DATE : 22ND FEBRUARY, 2006.

P.C. :

1. The present application is made for ex-parte decree for non-compliance of the order dated 14.9.2005 passed in Summons for Judgment No. 593 of 2003. By the said order the defendants i.e. the Oriental Bank of Commerce were directed to deposit a sum of Rs. 8 lacs in a period of four weeks.

2. Admittedly the said amount is not deposited and the office of the Prothonotary and Senior Master has issued a non-deposit certificate dated 16.11.2005. In the light of the judgment of the division bench in the case of **M/s.D. Shanlal and etc. vs. Bank of**

Maharashtra reported in AIR 1989 Bom.150 the decree must follow as a matter of course.

3. However the learned counsel Mr. Doctor appearing for Videocon Properties Ltd has contended before me that after the order is passed in the said summons for Judgment on 14.4.2005 the applicants have taken out a Chamber Summons No. 1333 of 2005 to be impleaded as party defendant to the present suit. He has also pointed out that the applicant has also filed their own substantive suit against the plaintiff being Suit No. 2907 of 2003. The said suit is filed against the plaintiff for conveyance of the property which has been agreed to be purchased under an MOU dated 29.12.1994. In the said suit the applicants have claimed various reliefs inrespect of the said MOU dated 29.12.1994.

4. Learned counsel appearing for the applicant further contends that I cannot pass a decree on the basis of non-deposit certificate in Summons for Judgment no. 593 of 2004 for the

following reasons :

5. Firstly it has been contended that the Chamber summons No,. 1333 of 2005 as well as Notice of Motion no. 3004 of 2005 should be heard alongwith the present matters for passing ex-parte decree. Learned counsel for the applicant has contended that a precipe was filed on 13.12.2005 with the department seeking directions from the learned chief justice that the Chamber Summons as well as Notice of Motion and the application for ex-parte decree should be assigned to one single judge as the issues in the said proceedings are over-lapping. He has alternatively submitted that I should not pass the decree till either the necessary directions are obtained from the learned chief justice or the Chamber Summons no. 1333 of 2005 is decided by the learned judge taking up Chamber Summons. He has also drawn my attention to the fact that the chamber summons has been adjourned atleast on seven occasions so as to enable the applicants to obtain necessary directions from the learned

Chief Justice for clubbing all the matters together. He has further contended that the applicant is a necessary and proper party in the present suit and in view of the fact that the order is obtained without he being impleaded as a party, thus the said order is nullity. He has further contended that ultimately even if the decree is passed against the bank the said amount will be debited to the account of the applicant and thus they are likely to suffer and therefore also I should not pass any ex-parte decree in the present suit.

6. Firstly in my opinion the order dated 14/12/2005 passed in S/J No. 593 of 2004 has achieved finality because none of the parties including the applicant herein has challenged the said order. In the said order I have taken a view that the applicant is not a necessary or a proper party to the present proceedings. In para-7 of the said judgment I have taken the aforesaid view. The said para-7 is reproduced hereunder :

> "7. The third contention is that Videocon Properties Ltd. is necessary and proper party. The said contention is required to be stated to be rejected. Guarantee being independent contract the parties to the contract are only plaintiffs and defendant and therefore Videocon Properties Ltd is neither necessary nor proper party in so far as suit is based on said bank guarantee is concerned.

7. I am of the further opinion that if the applicants were aggrieved by the order passed on 14.9.2005 in Summons for Judgment it was open for them to file an appeal after obtaining leave from the appellate court under Section 96 of the Civil Procedure Code which the applicant has admittedly not done. Secondly the contention of the learned counsel for the applicant that the matter should not be heard because the precipe dated 13.9.2005 to club all the matters together is pending is also without any substance an merits. The department has produced the precipe dated 13.12.2005 before me. The departments noting on the said precipe indicates that the learned advocate on record for the applicants did not

mention the number of Notice of motion in the said pending suit being Suit no. 2907 of 2003 which was sought to be tagged alongwith Chamber summons 1333 of 2005. It has been further noted on the said precipe that the Notice of motion which has been found in the proceedings is Notice of Motion no. 2982 of 2003 and the same was already disposed off. It has been noted on the precipe that an application for ex-parte decree being the Summons for Judgment No. 593 of 2003 is also disposed off and therefore the question of tagging either the Summons for Judgment or the Notice of Motion with Chamber Summons No. 1333 of 2005 cannot arise. However the learned counsel for the applicant states that the notice of motion which was required to be tagged is Notice of Motion no. 3004 of 2003 and not 2982 of 2003. The said Notice of Motion is not even referred to or mentioned in the entire precipe for the purpose of tagging. Even an advocate on record of the applicant has not bothered to go to the department to ascertain why directions are not passed on the said precipe. In my view thus

the applicant has failed to obtain order from the learned chief justice though the precipe is filed as far back as 13.12.2005. There is no merits therefore in the request to defer passing of an ex-parte decree for non-deposit by the defendants. There is one more endorsement on the said precipe which indicates that there is no mention in the precipe that the precipe is served on the other side for raising objections if any to such propose directions which were sought from the Chief Justice. In view of the aforesaid endorsements the department was right and justified in not placing the matter before the learned chief justice for obtaining necessary orders. It was necessary and duty of the advocate of the applicant to ascertain from the office of the Prothonotary and Senior Master why the said orders are not obtained on the said preceipe. If it would have been done the advocate would have come to know of the said objections. However the advocate on record has not done so.

8. Lastly I am of the opinion that the applicants having filed its own substantive suit it is open for them to obtain necessary order in their own substantive suit irrespective of the fact that the decree is passed against the bank or not in the present proceedings because obviously the decree against the bank would not bind the applicant in the suit which is pending in this court.

9. In light of the aforesaid I do not find any reasons either to postpone the passing of the decree pursuant to the non-deposit of the amount as directed by the defendant bank nor I consider it necessary to await the outcome of the Chamber Summons No.1333 of 2005 or Notice of Motion No. 3004 of 2005. It is also not out of placed to mention that the present matter for passing of an ex-parte decree was before me on 20/2/2003 when matter was adjourned till today on the application of the applicant herein. However on 21/2/2003 when Chamber Summons No. 1333 of 2005 came up for hearing before Vazifdar, J in place

of working out the same an adjournment was obtained for 2 weeks. In that light of the matter there shall be a decree as prayed in favour of the plaintiffs and against the defendants with further interest at the rate of 12% p.a. on the principal amount of Rs.8,47,50,000/- from the date of the suit till payment and/or realisation.

sd/-

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